

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JAMES R. CROFTON,

Plaintiff,

v.

JO ANNE B. BARNHART,  
Commissioner of Social Security,

Defendant.

CIVIL NO. C05-0755-TSZ

REPORT AND  
RECOMMENDATION

Plaintiff appeals to the District Court from a final decision of the Commissioner of the Social Security Administration (“the Commissioner”) denying her application for Disability Insurance Benefits and Supplemental Security Income under Titles II and XVI of the Social Security Act. For the reasons set forth below, it is recommended that the Commissioner’s decision be REVERSED and this matter REMANDED for further proceedings.

I. PROCEDURAL HISTORY

Plaintiff filed an application for social security disability benefits on December 15, 2000, and an application for SSI benefits on January 10, 2001. He alleges disability beginning December 31, 1993 due to anxiety, attention deficit hyperactivity disorder, sleep disorder, metal fragments in his left hand, and depression. Tr. 29, 96, 134, 524. His applications were denied initially and on

1 reconsideration. Tr. 43-46, 49-51. Plaintiff failed to appear for a scheduled hearing, and  
2 Administrative Law Judge Richard Hines (hereinafter ALJ Hines) dismissed Plaintiff's request for  
3 hearing on May 29, 2002. Tr. 40-43. A timely appeal was filed, and on September 19, 2002, the  
4 Appeals Council granted Plaintiff's request for review, vacated ALJ Hines' dismissal order and  
5 remanded the case for further proceedings. Tr. 66-68. On remand, ALJ Lee Dethloff (hereinafter  
6 ALJ Dethloff) held a hearing on August 26, 2003. Plaintiff, Plaintiff's mother and Medical Expert  
7 (ME) Dr. Brubakken testified.

8 Based upon Dr. Brubakken's testimony that the records he considered showed Plaintiff's  
9 functioning to be borderline, and his overall functioning appeared to be worsening, ALJ Dethloff  
10 ordered a consultative psychological examination, which Dr. Richard Palmer performed on October  
11 23, 2003. Tr. 506-12. A supplemental hearing was held on January 26, 2004. Plaintiff's concurrent  
12 applications were denied by ALJ Dethloff. Tr. 25-37. Plaintiff filed an appeal to the Appeals  
13 Council, which declined review, leaving ALJ Dethloff's decision as the final decision of the  
14 Commissioner. Plaintiff filed a timely complaint seeking judicial review of the Commissioner's final  
15 decision.

## 16 II. THE PARTIES' POSITIONS

17 Plaintiff alleges that ALJ Dethloff erred by failing to find that plaintiff's left-hand impairment  
18 and depression/adjustment disorder were "severe impairments" at step 2; failing to properly consider  
19 the medical testimony in assessing Plaintiff's mental impairments; failing to properly consider the  
20 credibility of Plaintiff and his mother; failing to consider all of the evidence of record in determining  
21 Plaintiff's RFC; and failing to include all of Plaintiff's impairments in the hypothetical posed to the  
22 VE, resulting in the erroneous conclusion that Plaintiff could perform his past relevant work as a  
23 dishwasher and other work existing in the national economy. The Commissioner contends that the  
24 ALJ properly evaluated the law and evidence, and his decision is supported by substantial evidence.

## 25 III. STANDARD OF REVIEW

1 This Court may set aside the Commissioner's denial of social security disability benefits when  
2 the ALJ's findings are based on legal error or are not supported by substantial evidence in the record  
3 as a whole. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9<sup>th</sup> Cir. 1989). Substantial evidence means  
4 more than a scintilla, but less than a preponderance; it is such relevant evidence as a reasonable mind  
5 might accept as adequate to support a conclusion. *Id.* To determine whether substantial evidence  
6 supports the ALJ's decision, we must consider the evidence as a whole, weighing both evidence that  
7 supports, and evidence that detracts from the ALJ's conclusion. *Id.* The ALJ is responsible for  
8 determining credibility, resolving conflicts in the testimony, and resolving ambiguities. *Id.* Where  
9 evidence is susceptible of more than one rational interpretation, it is the ALJ's decision that must be  
10 upheld. *Id.*

#### 11 IV. THE SEQUENTIAL EVALUATIONS PROCESS

12 The Social Security regulations set forth a five-step sequential evaluation process for  
13 determining whether a claimant is disabled under the Social Security Act. *Bowen v. Yuckert*, 482  
14 U.S. 137, 140 (1987); 20 C.F.R § 416.920. At step one, the claimant must establish that he is not  
15 engaging in any substantial gainful activity. *Id.* At step two, the claimant must demonstrate that he  
16 has one or more severe impairments. *Id.* At step three, the Commissioner will determine whether  
17 the claimant's impairment meets or equals any of the listed impairments described in the regulations.  
18 *Id.* At step four, if the claimant's impairment(s) neither meets nor equals one of the listed  
19 impairments, the Commissioner will then evaluate the claimant's residual functional capacity and past  
20 relevant work. If claimant is not able to perform his past relevant work, the burden shifts to the  
21 Commissioner at step five to identify jobs existing in significant numbers in the national economy that  
22 the claimant can perform given her residual functional capacity, age, education, and

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1 work experience. *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9<sup>th</sup> Cir. 1999). If a claimant is determined  
2 to be disabled at any stage of the process, there is no need to consider subsequent steps. *Id.* at  
3 1099.

#### 4 V. SUMMARY OF THE RECORD

5 Plaintiff James Crofton was 31 years old on the alleged disability onset date, and 41 when the  
6 ALJ issued the decision. Plaintiff testified that he completed the seventh grade. He has done past  
7 work as a dishwasher, donut fryer, and laborer. Tr. 561, 135, 140, 506. Plaintiff reported that as a  
8 child, he suffered a BB shot in his left hand which was never removed. While working, the BB  
9 shattered into fragments, causing pain in his left hand to become worse, and forcing him to stop  
10 working. Tr. 562-63. Plaintiff testified that in February 2003, he suffered a seizure and fell, hitting  
11 his head. He claims that since then he has had memory problems which caused forgetfulness (Tr.  
12 563, 578, 565, 568-69), short temper (Tr. 572-73), and social isolation Tr. 569, 570, 576.

#### 13 The ALJ's Decision

14 The ALJ found at step one that the Plaintiff had not engaged in substantial gainful activity  
15 since his alleged disability onset date of December 31, 1993. Tr. 30, Finding 2. At step two, the  
16 ALJ found that Plaintiff's severe impairments included borderline intellectual functioning and a  
17 personality disorder. Tr. 30-21, 36, Finding 3. The ALJ found that Plaintiff's seizure disorder, left  
18 hand problems and affective disorder (major depression or adjustment disorder) were not severe  
19 impairments. Tr. 31-32. At step three, the ALJ found that Plaintiff's impairments did not meet or  
20 equal the requirements of a listed impairment. Tr. 36, Finding 4. The ALJ determined that Plaintiff  
21 had the RFC to perform all exertional levels of work, with limitations for simple, repetitive tasks with  
22 no hazards and no close personal interactions. Tr. 37, Findings 6, 7. At step four, the ALJ found  
23 that Plaintiff was able to perform his past relevant work as a dishwasher. Tr. 36, Findings 8, 9. At  
24 step 5, the ALJ determined that Plaintiff could also perform work as a night cleaner and a  
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1 groundskeeper. Tr. 36. The ALJ found Plaintiff not disabled at any time through the date of his  
2 decision. Tr. 36, Finding 10.

## 3 VI. DISCUSSION

### 4 A. Evaluation of Plaintiff's Credibility

5 The Plaintiff challenges the ALJ's determination that his testimony was not fully  
6 credible, arguing that there is no evidence of malingering and the record of Plaintiff's pain and  
7 impairments is supported by objective evidence. Tr. 34. Unless there is affirmative evidence  
8 showing that the claimant is malingering, the Commissioner's reasons for rejecting the claimant's  
9 testimony must be clear and convincing. *Morgan v. Commissioner of SSA*, 169 F.3d 595, 599 (9<sup>th</sup>  
10 Cir. 1999).

11 An ALJ may not base his determination of Plaintiff's credibility solely on a lack of objective  
12 evidence, although it is a factor to consider. *See Burch v. Barnhart*, 400 F.3d 676, 680-81 (9<sup>th</sup> Cir.  
13 2005). However, when combined with other evidence contained in the record, the ALJ may draw  
14 adverse inferences as to Plaintiff's credibility. *Tonapetyan v. Halter*, 242 F.3d 1144, 1147-48 (9<sup>th</sup>  
15 Cir. 2001). An ALJ may also consider a claimant's work history in determining credibility. *Light v.*  
16 *Social Security Administration*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997).

17 In discrediting Plaintiff's subjective complaints, the ALJ found that Plaintiff's "degree of  
18 alleged physical and mental dysfunction is not supported by the medical record". Tr. 35. The ALJ  
19 arrived at this conclusion by adopting the testimony of medical expert Norman Gustavson, Ph.D.  
20 Dr. Gustavson testified that Plaintiff's "pattern of avoidance, exaggeration of problems and his self-  
21 image as a "victim" were symptoms of his personality disorder. Tr. 609. Dr. Gustavson identified  
22 Plaintiff's exaggeration as "a method used by the claimant to get out of doing things." Tr. 609-610.

23 The ALJ referred to Plaintiff's own words, found in Dr. Rowe's report, to show he is  
24 avoiding work. Tr. 35. For instance, the Plaintiff told Dr. Rowe that it was his lack of a GED  
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1 certificate and his incomplete education that was the impediment to his employment. Tr. 428-430.  
2 However, the information from Judy Bortz of Skill Source indicates that Plaintiff avoided the  
3 completion of his requirements for a GED. Tr. 202-203. Moreover, the ALJ found that Plaintiff had  
4 a spotty work record, a pattern of avoidance, and a tendency to exaggerate the extent of his  
5 limitations. Tr. 35, 203, 609. Although Plaintiff alleged his impairments precluded all work, Plaintiff  
6 had only one seizure in adulthood, and his depressive symptoms improved with Paxil.  
7 Tr. 370, 382, 488. Therefore, I conclude that the ALJ provided clear and convincing reasons  
8 supported by substantial evidence for discounting Plaintiff's testimony on disability.

9 B. Evaluation of Lay Testimony

10 Plaintiff alleges that the ALJ improperly rejected the testimony of Plaintiff's mother, Nancy  
11 Reynaga. An ALJ must consider a lay witnesses' observations of how the claimant's impairment  
12 affects his ability to work. 20 C.F.R. § 404.1513(e)(2); *Smolen v. Chater*, 80 F.3d 1273, 1288 (9<sup>th</sup>  
13 Cir. 1996). The ALJ may reject the testimony of a lay witness by providing legitimate, germane  
14 reasons. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9<sup>th</sup> Cir. 1993).

15 At the hearing, Ms. Reynaga testified that her son had "memory problems, was nervous and  
16 irritable." Tr. 584, 86,89. She reported that his hands welled so that he was unable to use it, and  
17 had difficulty focusing." *Id.* She also reported that the Plaintiff forgot simple things, and had  
18 difficulty staying focused. *Id.* In her written statement, Ms. Reynaga described her son as a nervous  
19 person, very easily upset, who had difficulty sleeping, a short attention span and a poor memory.  
20 Tr. 166. She stated that he cooks, "does all his household chores, takes care of his two children,  
21 and participates in school and church activities." Tr. 168. She indicated that his nervousness and  
22 upset had increased. Tr. 170.

23 The ALJ found that Ms. Reynaga's written statement was inconsistent with the degree of  
24 dysfunction alleged by the claimant, and that Ms. Reynaga's testimony about her son's symptoms did  
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1 not provide objective findings to establish his level of impairment. The ALJ partially rejected the  
2 testimony of Ms. Reynaga because she “was merely reciting what [Plaintiff] had told her.” Tr. 35.

3 However, Ms. Reynaga’s testimony appears credible. The record shows that Ms. Reynaga  
4 lived with the Plaintiff and had the opportunity to observe him on a regular basis. Her testimony and  
5 daily activities questionnaire describe what she personally observed of Plaintiff’s symptoms and  
6 impairments. Additionally, the pain and swelling in Plaintiff’s hand is documented in the medical  
7 record. Furthermore, Ms. Reynaga’s statement that the Plaintiff cooks, and does household chores is  
8 consistent with Plaintiff’s daily activities questionnaire. Tr. 172. Moreover, there is no basis for the  
9 ALJ’s conclusory statement that Plaintiff manipulated his mother to support his allegations of  
10 disability. Tr. 35.

11 In light of these facts, I conclude that the ALJ failed to give germane reasons for discrediting  
12 Ms. Reynaga’s testimony. Consequently, her testimony should be credited as true. *Schneider v.*  
13 *Commissioner of the Social Security Administration*, 223 F.3d 968 (9<sup>th</sup> Cir. 2005).

14 C. The ALJ’s Step Two Analysis

15 Plaintiff argues that the ALJ improperly determined that his left-hand impairment and  
16 depression/adjustment disorder were not severe impairments. Under step two of the sequential  
17 analysis, an impairment is determined to be medically severe unless the impairment is only “a slight  
18 abnormality with no more than minimal effect on the ability to do basic work activities.” 20 CFR §§  
19 404.1523 and 416.923; *see also* SSR 85-28, 1985 WL 56856 at \*3 (1985); *Yuckert v. Bowen*, 841  
20 F.3d 303, 306 (9<sup>th</sup> Cir. 1988) (*adopting* SSR 85-28).

21 1. Left Hand Impairment

22 Plaintiff argues that the ALJ improperly overlooked the medical reports of Dr. Anderson, Dr.  
23 Dahl, Dr. Kaster and Dr. Michael J. Abbot, which, if considered, would support a finding that  
24 Plaintiff’s left hand impairment met the *de minimis* requirement at step two. The medical evidence of  
25 Plaintiff’s left hand impairment includes x-ray results showing foreign bodies in Plaintiff’s hand (Tr.

1 32, Ex. 13F-48; 23F-3, 8 and 23-F-14, 23F-28), and Plaintiff's history of a ganglion cyst. Tr. 32, Ex.  
2 25F-2, Ex. 19F.

3 On March 20, 2000, Dr. Anderson found that Plaintiff had full range of motion, but flexion of  
4 his fingers caused pain and limited his grip strength. He stated that Plaintiff was "left with a  
5 permanent restriction to avoid forceful or repetitive gripping, hammering or motion with his left  
6 hand." Tr. 290-294. On April 20, 2000, Dr. Dahl noted "mild tenderness in the palm with deep  
7 palpation and full range of all [Plaintiff's] fingers". Tr. 292. He recommended that Plaintiff find  
8 "some other slightly less strenuous form of work . . . as opposed to heavy manual labor" because  
9 there "would be a tendency for these symptoms to recur should Plaintiff continue with his current  
10 occupational status." Tr. 292

11 On September 21, 2002, Dr. Kaster diagnosed probable dorsal tendonitis of the left hand,  
12 and noted symptoms of hand swelling and tenderness which was exacerbated "significantly by flexion  
13 of the wrist and extension at the wrist". Tr. 443. On October 9, 2002, Dr. Abbot assessed Plaintiff's  
14 left hand and wrist pain. Plaintiff reported that every time he does manual labor, the pain flared up.  
15 Tr. 440. Dr. Abbott limited Plaintiff to lifting no more than five pounds with his left hand due to  
16 pain caused by manual labor. Tr. 440.

17 Relying on a medical opinion finding no objective evidence of disability <sup>1</sup>, the ALJ stated:  
18 "the hand problems have not been shown to affect the claimant's ability to perform work-related  
19 activities." Tr. 32. The ALJ also stated that Dr. Wilhelm expressed a willingness to allow Plaintiff  
20 to return to work. Tr. 501. For these reasons, the ALJ concluded that "[t]he claimant has failed to  
21 establish that the history of foreign bodies in his left hand or the history of a ganglion cyst is a severe  
22 impairment." Tr. 32. However, the ALJ's decision does not demonstrate whether he considered the

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24 <sup>1</sup> The ALJ attributed this opinion to Dr. Wilhelm when in fact the notation was made by Dr.  
25 Thompson, who stated that Plaintiff had been recently seen in the orthopedic clinic, and [the clinic]  
26 found no objective evidence of disability. Tr. 500.



1 reports of doctors Anderson, Dahl, Kaster, and Abbott regarding Plaintiff's left hand impairment,  
2 pain symptoms and resulting functional limitations identified by them. Rather the ALJ reasoned that  
3 in light of Plaintiff's daily activities, Plaintiff's hand problems "have not been shown to affect the  
4 claimant's ability to perform work-related activities." The ALJ's conclusion was in error when  
5 considered along with lay testimony that is being credited as true.

6       2.       Evaluation of Evidence of Plaintiff's Mental Impairment

7       Plaintiff argues that the ALJ erred in determining that Plaintiff's affective/adjustment  
8 disorder was not severe, and by according greater weight to the opinion of a non-examining medical  
9 expert than to Plaintiff's examining physicians.<sup>2</sup>

10       The opinions of treating and examining sources are given greater weight than the opinions of  
11 non-examining sources. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). In order to reject the  
12 medical opinions of an examining or treating doctor, the ALJ must give specific, legitimate reasons  
13 for doing so that are based on substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035,  
14 1043 (9<sup>th</sup> Cir. 1995). A doctor's ultimate conclusions on disability may only be rejected for clear  
15 and convincing reasons. *Embrey v. Bowen*, 849 F.2d 418, 422 (9<sup>th</sup> Cir. 1988). The report of a non-  
16 treating, non-examining physician, combined with the ALJ's own observations of the claimant's  
17 demeanor at the hearing, without more, does not constitute substantial evidence. *Lester v. Chater*,  
18 81 F.3d at 831. The opinion of a non-examining testifying ME may serve as substantial evidence  
19 when supported by other consistent evidence in the record. *Andrews*, 53 F.3d 1035 at 1041.

20       Consultative examiner Thomas Rowe evaluated Plaintiff in June 2001, and diagnosed an  
21 affective/adjustment disorder with anxious and depressed mood, borderline intellectual functioning,  
22 and a GAF of 50. Tr. 426-30. On July 10, 2001, State Agency Consultant Dr. Michael Brown,

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24       <sup>2</sup> The ALJ disputes both the existence of a major depressive disorder/adjustment disorder,  
25 and its severity, stating: "a diagnosis of a major depressive disorder/adjustment disorder has not been  
26 established by the claimant." Tr. 33.

1 Ph.D. diagnosed Plaintiff with an affective/adjustment disorder with depression and borderline  
2 intellectual functioning. Tr. 308. On October 23, 2003, examining physician Richard Palmer  
3 diagnosed Plaintiff with major depressive disorder (moderate), borderline intellectual functioning,  
4 and a GAF of 45. Tr. 510. The opinions of Rowe and Brown appear to corroborate Dr. Palmer's  
5 diagnosis of depression.

6 Dr. Gustavson testified as a medical expert, stating that "the record has a lot to support a  
7 diagnosis of dependent personality disorder and perhaps avoidant or personality disorder NOS with  
8 dependent and avoidant features."<sup>3</sup> Tr. 602-03. In adopting Gustavson's testimony, the ALJ stated,

9 "Dr. Gustavson's conclusion is given greater weight than the conclusions from Dr.  
10 Palmer and Dr. Rowe concerning a depressive/adjustment disorder. The medical  
11 expert has had the advantage of viewing all of the medical evidence. Dr. Palmer and  
12 Dr. Rowe only had access to medical reports available at the time of their evaluations.  
13 Thus, Dr. Gustavson has based his conclusion on the entire evidentiary record while  
14 the other doctors formed their opinions on only a portion of the medical evidence."  
15 Tr. 32-33.

16 The ALJ also stated,

17 "Furthermore, the medical findings associated with the diagnosis of a "depressive  
18 disorder" are unimpressive. Dr. Rowe based the diagnosis of (sic) the claimant's  
19 reported history of depression. Thus, the claimant's allegations were simply turned  
20 into a diagnosis . . . And Dr. Palmer's conclusion is also based on minimal objective  
21 findings. In fact, much of Dr. Palmer's report is simply a recitation of the claimant's  
22 complaints. . ." Tr. 33.

23 While the ALJ cited specific objective findings made by Dr. Palmer, the Plaintiff responds that  
24 the ALJ overlooked evidence that was not based on Plaintiff's self-reporting; specifically, Dr. Rowe  
25 observed that Plaintiff "evidenced some mild dysphoria and anxiety." Tr. 429. Dr. Palmer's  
26 observations that Plaintiff's energy level generally appeared somewhat low, that Plaintiff's affect was  
fairly constricted, that Plaintiff had a distinctly flat and depressed quality, that Plaintiff never laughed  
and seldom smiled, that Plaintiff's eye contact was minimal, that Plaintiff did not appear especially

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<sup>3</sup>Dr. Gustavson concluded that the claimant's statements regarding his limitations "are  
subjective report," and evidence was lacking "that the claimant's condition got markedly worse after  
this falling down episode." Tr. 606, 608.

involved, interested or very interactive, and that Plaintiff's memory problems were evident demonstrate to this Court that these depressive symptoms are not based merely on self-reporting. Plaintiff's Opening Brief at 21; Tr. 507. Thus, the ALJ did not give legitimate reasons for accepting the testimony of Dr. Gustavson over Plaintiff's examining physicians as to the *existence* of a major depressive disorder or adjustment disorder. Consistent evidence of depression in this record includes the opinion of Dr. Richard Washburn, who made an Axis I diagnosis of major depression, an Axis II diagnosis of personality disorder NOS, and assigned a GAF of 55.<sup>4</sup> Tr. 549. It also includes Plaintiff's treatment by Sarah Wilhelm, M.D. for mood swings, memory loss and insomnia with depression. Tr. 476. Accordingly, I conclude that the ALJ erred in determining that Plaintiff did not suffer from an adjustment/depressive disorder.

#### D. The ALJ's Step Three Determination

Plaintiff argues that the ALJ erred in determining that Plaintiff's combined impairments did not meet or equal the Listing of Impairments. As stated above, the ALJ erred in concluding that Plaintiff did not suffer from an affective/adjustment disorder. Upon remand, the ALJ shall consider Plaintiff's left-hand impairment, borderline intellectual functioning and affective/adjustment disorder in determining whether Plaintiff's combined impairments meets or equal the Listings of Impairments.

#### E. The ALJ's Step Four Determination

Plaintiff also argues that the ALJ erred in his RFC assessment by failing to adopt the functional limitations as found by Dr. Brown, and by Dr. Palmer in his psychological evaluation.

The Defendant claims that the ALJ properly framed the hypothetical and found Plaintiff not disabled at step five.<sup>5</sup> Defendant's Brief at 2.

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<sup>4</sup> Washburn also diagnosed amnesic disorder NOS, generalized anxiety disorder, panic disorder without agoraphobia and Learning disorder, NOS on Axis I, and an Axis III seizure disorder.

<sup>5</sup> The step four inquiry as to whether a claimant may perform past relevant work does not require the use of vocational testimony. *Crane v. Shalala*, 76 F.3d 251, 255 (9<sup>th</sup> Cir. 1996).

1 Residual Functional Capacity is defined as the most that an individual can do in spite of his  
2 physical and/or mental limitations that affect the ability to perform work-related tasks. *See* 20 CFR  
3 §§ 404.1545 and 416.945, SSR 96-8p available at 1996 WL 374184. In view of this court's  
4 conclusions above regarding the ALJ's errors at step two and three, the Plaintiff's RFC will be need  
5 to be determined anew on remand.

#### 6 VII. CONCLUSION

7 The Commissioner's decision is not based on substantial evidence. Based on the foregoing,  
8 the undersigned recommends that the Commissioner's decision be REVERSED and this matter  
9 REMANDED for further proceedings. A proposed Order accompanies this Report and  
10 Recommendation.

11 DATED this 26th day of January, 2006.

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15 MONICA J. BENTON  
16 United States Magistrate Judge  
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25 Nonetheless, a vocational expert testified at the supplemental hearing.